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IN THE

Supreme Court of the United States

October Term, 1969

No. 236

WILLIAM EVANS, Member of the
BOARD OF SUPERVISORS OF ELECTIONS
OF BALTIMORE CITY, *et al.*,

Appellants,

v.

TILLYE CORNMAN, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

MOTION TO AFFIRM

Of Counsel:

JAMES B. BLINKOFF
Strasser, Spielgelberg, Fried,
Frank & Kampelman

RICHARD SCHIFTER
1700 K Street, N. W.
Washington, D. C. 20006

Counsel for Appellees

THE CASILLAS PRESS, INC. — 1717 K Street, N. W. — Washington, D. C. — 223-1220

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, move that the final order of the District Court be affirmed on the ground that the questions raised are, in light of recent decisions of this Court, so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Is a tract of land which is located within the geographic boundaries of the State of Maryland, from whose residents the State of Maryland and/or one of its subdivisions collect income, sales, use, unemployment insurance, gasoline and other motor vehicle fuel taxes and over whom the State exercises certain other sovereign powers, to be deemed not part of said State for the purpose of the voting rights of its residents solely because the federal government exercises jurisdiction over it under the provisions of Article I, Section 8, Clause 17 of the United States Constitution?

2. Where certain apartment dwellers on a tract of land within the geographic boundaries of the State of Maryland pay to the State and its subdivisions the same taxes paid by all other apartment dwellers within the State, may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts for divorce and adoption proceedings, does the State's action in depriving these apartment dwellers of their franchise solely because their landlord, the federal government, does not pay property taxes to the State and the State courts do not have jurisdiction over offenses committed by them at their place of residence, comport with the requirements of the equal protection clause?

STATEMENT OF THE CASE

This is a direct appeal from the decision of a three-judge court holding that the State of Maryland could not, consistent with the requirements of the equal-protection clause, exclude residents of a federal enclave from the State's voter registry. The opinion of the court below is reported at 295 F. Supp. 654 (D. Md. 1969) and is reprinted in the Appellants' Appendix, pp. 4a-15a.

All appellees reside on the grounds of the National Institutes of Health, (hereinafter referred to as "NIH"), a federal reservation located within the geographical boundaries of Montgomery County, Maryland. Ten of the appellees had been registered voters within the State of Maryland for many years. On October 19, 1968, they were advised by the members of the Permanent Board of Registry of Montgomery County, that their names would be removed from the County voters' registry because as residents of federal property they did not qualify for voting in Maryland under the State Constitution.[1] The other two appellees attempted to register to vote during 1968, but were not permitted to do so for the same reasons.

The action of the Board of Registry was based upon a Maryland Court of Appeals decision, *Royer v. Board of Election Supervisors,* 231 Md. 561, 191 A.2d 446, *cert. denied,* 375 U.S. 921 (1963). *Royer* had held that a person residing on a so-called federal enclave located within Maryland was not a resident of the State within the meaning of Article I, Section 1 of the Maryland Constitution,[2] and that, therefore, such a person was not entitled to vote in state or federal elections.

Contending that the decision in the *Royer* case violated the equal protection clause of the fourteenth amendment

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[1] Appellants contend that those appellees who were permitted to enroll as voters registered "by inadvertance". The fact is that there is no evidence in the record to suggest that any resident of the NIH tract had been denied the franchise at any time prior to 1968. NIH residents had up to that time participated in the electoral process without any hindrance.

[2] Article I, Section 1 of the Maryland Constitution grants the franchise to every citizen of the United States, twenty-one years of age or more "who has been a resident of the State for one year."

to the United States Constitution, appellees sought a declaratory judgment and injunctive relief prohibiting the individual members of the Montgomery County Board of Registry from removing the names of the ten appellees already registered and to compel the registration of the two appellees seeking to vote for the first time. A three-judge court was convened pursuant to 28 U.S.C. §2281 and a hearing held on October 25, 1969, just ten days prior to Election Day. In its initial decision the court recognized the "grave constitutional question" raised by appellees, but, rather than immediately rendering a decision on the merits, ordered the *status quo* maintained pending further briefs and oral argument.[3] Thus under the court's initial order only those appellees previously registered were allowed to vote in the November 1968 election.

On January 29, 1969, the three-judge court unanimously ruled that the interpretation placed on the word "resident" by the Maryland Court of Appeals in *Royer v. Board of Supervisors, supra,* deprived appellees of the equal protection of the laws. An order granting appellees the relief sought was then issued. The Maryland Attorney General indicated a desire to appeal the court's order, but the named defendants, the Permanent Board of Registry of Montgomery County, demurred. Thereafter, on March 17, 1969, the Attorney General of Maryland and members of of the Board of Supervisors of Elections of Baltimore City filed a motion to intervene as parties defendant. The court below, with the consent of the defendants below and with no objection interposed by appellees, granted the motion to intervene and this appeal followed.

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[3] Appellants' statement that "ten of the twelve plaintiffs were on or about October 18, 1968 removed from the voting rolls" (Jurisdictional Statement, p. 6) is in error. These plaintiffs were threatened with removal of their names but were not actually removed from the registry.

ARGUMENT

The decision in *Royer v. Board of Supervisors, supra,* is based upon a doctrine concerning the legal status of federal enclaves evolved in the Nineteenth Century upon facts then obtaining. Specifically, this doctrine was premised upon the finding that a resident of a federal enclave was not a resident of the State wherein the enclave was located because, according to one of the early decisions in this area, he is "relieved from any obligation to contribute to her [the state's] revenues, and is subject to none of the burdens which she imposes on her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is [sic] the states of Indiana or Kentucky or the District of Columbia." *Sinks v. Reese,* 19 Ohio St. 306, 316 (1869). However, as the district court in the present case, 295 F. Supp. at 655-659 (Appellants' App. at 6a-12a), demonstrates, the factual premise underlying *Sinks v. Reese* no longer exists. Under State and federal laws enacted since the decision in *Sinks,* particularly in the last forty years, "the concept of exclusive federal jurisdiction over reservations . . . has been drastically altered." 295 F. Supp. at 657 (Appellants' App. at 9a-10a) In fact, as the opinion below makes clear, there is virtually no difference between the enclave and non-enclave resident and there is certainly no meaningful distinction between them.[4]

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[4] The NIH tract is located in the heart of the Bethesda community. It has for many years, and up to this date, been part of Precinct 8 of Election District 7 of Montgomery County, as defined by the County's Board of Elections Supervisors, in accordance with the provisions of Md. Ann. Code 1957, Art. 33, §2-12 (1968 Supp.). Appellees, who have resided on the tract for up to twenty years, pay income taxes to Montgomery County and the

(Cont'd)

In recent years, several state courts have recognized the artificiality of the rationale upon which the enclave doctrine was premised and have held enclave residents entitled to exercise the franchise. See *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P.2d 612 (1960); *Adams v. Londeree*, 139 W. Va. 748, 83 S.E.2d 127 (1954); *Arapajolu v. McMenamin*, 113 Cal. App. 2d 824, 249 P.2d 318, 34 A.L.R.2d 1185 (1952). Indeed, the *Royer* court itself was aware that significant changes had taken place in the relationship between the state and the enclave resident in recent decades, but *Royer* concluded that any "adjustment" respecting the right to vote should be made by "the sovereign legislative bodies and not imposed by the courts." 191 A.2d at 449.

(Footnote 4 continued)

State of Maryland, pay sales taxes to the State for purchases on the tract on which they reside, register their cars with the State of Maryland, and obtain Maryland drivers' licenses. They participate actively in the life of the community, belonging to religious congregations in the area and other community groups. Their children attend the schools of Montgomery County as residents, without paying tuition. For each such child attending public school Montgomery County receives an allotment of federal funds under Public Laws 815 (20 U.S.C. §§631-645) and 874 (20 U.S.C. §§236-244) of the 81st Congress which is double the allotment made for the children of federal employees who do not reside on federal property. Appellees are subject to the service of state process at their homes (Md. Ann. Code 1957, Art. 96, §34) and are subject to Maryland's unemployment (26 U.S.C. §3305) and workmen's compensation laws (40 U.S.C. §290). They are counted as residents of Maryland under the decennial census and Maryland's apportionment of seats in the House of Representatives is based on a population figure which includes them. Ten of the appellees have been Maryland voters for up to nineteen years. None of them can claim a residence elsewhere in the United States.

It is precisely on this last point – the abdication of judicial responsibility for insuring all citizens an equal voice in elections – that *Royer* is in direct conflict with a host of recent opinions by this Court. See, *e.g.*, *Kramer v. Union Free School District No. 15*, ___ U.S. ___, 23 L. Ed. 583 (1969); *Cipriano v. City of Houma*, ___ U.S. ___, 23 L. Ed. 647 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

I.

Before considering the opinions of this Court which compel the result reached below, it is important to emphasize what is *not* at issue in this case. Appellees do not question the right of a state to establish reasonable residence requirements before allowing a citizen to exercise the franchise. Cf. *Drueding v. Devlin*, 234 F. Supp. 721 (D. Md. 1964), *aff'd.*, 380 U.S. 125 (1964). Nor does this case cast any doubt upon the state's right to determine the *bona fides* of any prospective voter's assertion of state residency. Cf. *Carrington v. Rash, supra*. Indeed, the only issue presented is whether a state may declare that a citizen's decision to reside on a federal enclave within that state *ipso facto* disqualifies him from exercising his fundamental right to vote.

Moreover, the State does not challenge the proposition that all appellees would be eligible to vote if only they chose not to live on the grounds of the National Institutes of Health. Nor does the State question that the land upon which appellees reside was a part of Maryland until 1953 when the Maryland legislature ceded the same to the United States pursuant to Article I, Section 8,

Clause 17 of the United States Constitution. See Md. Ann. Code 1957, Art. 96, §34. Instead, Maryland argues that the 1953 cession resulted in the permanent disunion between the State and the enclave and created, in effect, a state within a state.

The State's position, premised on the concept of extra-territoriality of federal enclaves, is directly contrary to the opinion of this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953). The question before the Court in *Howard* was whether a federal enclave on which a Naval Ordnance Plant was located could be lawfully annexed by the City of Louisville. It was not disputed that the United States exercised exclusive jurisdiction over the enclave. From that fact the trial court had concluded that the tract was no longer a part of the Commonwealth of Kentucky and thus could not be annexed by the City. This Court disagreed:

> "When the United States, with the consent of Kentucky, acquired the property on which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. . . . A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. *The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference*

> *with the jurisdiction asserted by the Federal Government.* The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aims. It is friction, not fiction to which we must give heed." (Emphasis supplied.) 344 U.S. at 626-627.

Since the concept of the extraterritoriality of federal enclaves is deemed a fiction with respect to municipal annexation laws, certainly extraterritoriality must be viewed as a fiction where the issue at stake is what the District Court characterized as "one of the most basic of those rights enjoyed by a citizen of a free democratic society." 295 F. Supp. at 659 (Appellants' App. at 12a.)

II.

Carrington v. Rash, supra; Kramer v. Union Free School District No. 15, supra; and *Cipriano v. City of Houma, supra,* so obviously compel the result reached by the three-judge court as to obviate the need for further argument and render the questions posed by this appeal unsubstantial. See, also, *e.g., Williams v. Rhodes, supra; Reynolds v. Sims, supra; Wesberry v. Sanders, supra; Baker v. Carr, supra.* It is now axiomatic that "no state can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No state shall . . . deny to any person . . . the equal protection of the laws.'" *Williams v. Rhodes, supra,* at 29.

There is no dispute as to Maryland's inherent authority to grant appellees and persons similarly situated the franchise. Thus, when the Maryland Court of Appeals in *Lowe v. Lowe,* 150 Md. 592, 133 Atl. 729 (1926), held that Maryland courts had no jurisdiction to dissolve a marriage of residents who resided within a federal enclave, the legislature immediately altered the *Lowe* result by

statute. See Md. Ann. Code 1957, Art. 16, §23. Likewise, the Maryland Court of Appeals showed in the *Royer* case that the State could, if it chose, grant the franchise to enclave residents. Compare *Rothfels v. Southworth, supra; Adams v. Londeree, supra; Arapajolu v. McMenamin, supra.*

Maryland's capacity to grant appellees the franchise is most pertinent to the proper evaluation of the State's argument that the distinction between residents of enclaves and other residents of the state is a rational, reasonable classification and not an invidious classification prohibited by the fourteenth amendment. Even before the decision in *Kramer v. Union Free School District No. 15, supra*, it was clear that state restrictions on the right to vote were to be viewed with utmost suspicion and were to be sustained only upon the state's demonstration of a compelling interest in maintaining the restrictions. *Harper v. Virginia State Board of Elections, supra,* at 670; *Reynolds v. Sims, supra,* at 561-62 (1964). *Kramer,* however, removed all doubts:

> "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . *Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.* See *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government

> are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." 23 L. Ed. at 589-90 (Footnotes omitted) (Emphasis supplied).

In view of Maryland's reliance in the present case upon appellees' immunity from property taxation (see Jurisdictional Statement, pp. 13-16), the excluded taxpayer's successful arguments in *Kramer* that "the level of property taxation affects him even though he does not own property, as property tax levels affect the price of goods and services in the community" and that "all members of the community have an interest in the quality and structure of public education" are particularly relevant.[5] The impact of *Kramer* and *Cipriano* upon the present case is clear. Both *Kramer* and *Cipriano* dealt with state statutes which, in certain special elections, limited the franchise to a portion of the state's regularly qualified electorate. Both New York and Louisiana sought to justify the discrimination inherent in their respective statutes by

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[5] As it is, appellants' contentions that appellees are "effectively exempt from the levy which supplies the lion's share of the revenues of local and county governments" (Jurisdictional Statement, p. 12) and that "education expenditures [are] benefits their children will reap but whose costs Plaintiffs will be exempt from bearing" (*Id.*, p. 15) simply do not correspond to the facts. The District Court found that property taxes account for about 50% of the operating budget of the Montgomery County Board of Education and about 12% of the non-education operating budget of Montgomery County. The obverse of their finding is that plaintiffs pay the taxes which fund 50% of the County's education operating budget and 88% of its non-education operating budget. See 295 F. Supp. at 658, n. 8 (Appellants' App. at 11a).

arguing that the state had a legitimate objective in limiting the franchise to those "primarily interested" in the election results. In each case this Court assumed *arguendo* that a state, under some circumstances, might so qualify the franchise but concluded that in both situations those excluded from the franchise were not in fact "substantially less interested or affected than those the statutes includes." 23 L. Ed. at 592; 23 L. Ed. at 651.

In the present case it cannot be gainsaid that each resident of the NIH tract is "substantially affected" by decisions of elected officials, from the President of the United States to members of the Montgomery County Board of Education. Thus, the court below correctly concluded:

> "[T]he plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote. A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations. . . . Without determining which way the scales would tip with respect to other rights, we are of the opinion that the incidents of jurisdiction exercised ty Maryland over these plaintiffs are sufficiently weighty that the important rights claimed here cannot be constitutionally denied." 295 F. Supp. at 659 (Appellants' App. at 13a.)

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the decision of the District Court was correct, that the questions raised by appellants are unsubstantial and that the order of the court below should, therefore, be affirmed.

Respectfully submitted,

Of Counsel:

JAMES B. BLINKOFF
Strasser, Spielgelberg, Fried,
Frank & Kampelman

RICHARD SCHIFTER
1700 K Street, N. W.
Washington, D. C. 20006

Counsel for Appellees

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BRIEF OF THE APPELLANTS

FRANCIS B. BURCH,
Attorney General of Maryland,
ROBERT F. SWEENEY,
Deputy Attorney General of Maryland,
GEORGE W. LIEBMANN,
Assistant Attorney General of Maryland,
HENRY R. LORD,
Assistant Attorney General of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201,
For Appellants.

The Daily Record Co., Baltimore, Md. 21203

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